

SUPREME COURT OF LOUISIANA

*No. 97-C-0956*

EDWARD MORGAN

Versus

ABC MANUFACTURER, DEF INSURANCE COMPANY,  
GHI PARTS SUPPLIERS, ET AL.

TRAYLOR, J., dissenting.

I agree with Justice Marcus that employer vicarious liability requires at least some control on the part of the employer. I disagree with both him and the majority that Article 2320 imposes strict liability on employers; consequently, I write separately to address the unconstitutionality of the majority's action in ignoring the exculpatory third paragraph of Article 2320. Because Justice Marcus has ably articulated this court's various interpretations of Article 2320, I will not discuss those interpretations.

That the Court's interpretation of Article 2320 has changed along with changes in society is not surprising; such an evolution in interpretation is to be expected, indeed required, if this Court is to perform its duty. Today's society is far different from that of 1804, when the Code Napoleon, Article 1384, first addressed the control issue with regard to employee torts. These societal changes, particularly in the areas of mobility and communication, have forced our courts to periodically reevaluate the amount and type of control which an employer must maintain over an employee to gain the protection of the exculpatory third paragraph of the Article.

While I recognize that under certain circumstances an employer should be found to maintain control over employees even when the employer could not possibly prevent negligent acts, some control, at least, is required by the statute. The proper issue before this Court is what amount of control is necessary, not whether control should or should not be required at all. That question has been answered in the affirmative by the legislature.

The majority correctly cites to La. Civ. Code art. 2320 which defines the liability of employers for their employees. The Article's third paragraph reads in pertinent part, "responsibility only attaches, when the . . . employers . . . might have prevented the act which caused the damage, and have not done it." The majority quotes, then ignores, this exculpatory paragraph, merely noting that "[b]ut whatever the reason or reasons which prompted the original article, courts step by step have refused to apply the exculpatory clause." Op. at 5, n. 6 (citing to Stone, Louisiana Civil Law Treatise, Tort Doctrine §89). The majority then tacitly admits that its action is ultra vires by stating, "This judicial interpretation of La. Civ. Code art. 2320 has been codified by the legislature in La. R.S. 9:3921," as though the legislature has a duty to override unconstitutional judicial vetoes of legislation. Rather than supporting the majority's argument, Section 9:3921 concerns an employers's rights, or lack thereof, with regard to remission, transaction, compromise, or other discharge as between the creditor and employee. La. R.S. 9:3921.

The Constitution of the State of Louisiana provides that the judicial branch shall not exercise legislative power. LA. CONST. arts. 1, 2. The relationship of the courts with the legislature has been defined on numerous occasions by this Court. "The law is the solemn expression of legislative will" and the purpose of the judiciary is to "merely interpret such expressions." *Tullier v. Tullier*, 464 So.2d 278, 282, (La. 1985). Further, courts cannot question the wisdom of fundamental law and frustrate the will of the people; their function is to interpret and apply that law. *Arata v. Louisiana Stadium and Exposition Dist.*, 225 So.2d 362 (La. 1969). Here, the majority is not interpreting Article 2320, it is "writing out of the law" the third paragraph of the Article. There is no authority for such a judicial "line-item veto." *Dow Hydrocarbons & Resources v. Kennedy*, 96-2471(La. 5/20/97), 694 So.2d 215, 218 n.7.

Surprisingly, the Court penned the following less than three months ago:

[A] court err[s] in allowing its own policy determination to override the policy determination made by the legislature. It is not the prerogative of the judiciary to disregard public policy decisions underlying legislation or to reweigh balances of interests and policy considerations already struck by the legislature. It is not our role to consider the wisdom of the legislature in

adopting the statute. It is our province to determine only the applicability, legality, and constitutionality of the statute.

*Soloco v. Dupree*, 97-1256 (La. 1/21/98), \_\_\_ So.2d \_\_\_ (citations omitted). This language is in direct support of the dissenters and directly contradicts the position the majority is now taking. Determining the “applicability, legality, and constitutionality” of a statute does not include ignoring, judicially rewriting, or refusing to apply a given law or portions thereof.

The majority states that requiring a plaintiff to prove that an employer retained control over his employee produces inconsistent results, Op. at 8-9, presumably because trial courts, viewing the different facts of different cases, sometimes find employers liable and sometimes do not. Aside from raising the obvious question: What consistent result is sought?, this reasoning for disregarding an important portion of a validly enacted statute is without authority. “Courts do not rule on the social wisdom of statutes, nor on their workability in practice. Imperfections in legislation are not in themselves grounds for judicial intervention unless those imperfections result in denial of constitutional rights or infringement on paramount statutory rights.” *Everett v. Goldman*, 359 So.2d 1256, 1270 (La. 1978). Here, the injured worker has a full remedy under the law. The only valid objection to the statute as written is that it is unconstitutional, which it is unquestionably not. As Justice Kimball has said, “[O]ur civilian system . . . strives to respect legislative will and works to save legislative enactments unless they possess specific constitutional infirmities.” *Dow*, 694 So.2d at 219 (Kimball, J., concurring).

Because the majority has imposed liability on all temporary employers, regardless of the amount of control they may or may not exert over their employees, the majority is deliberately ignoring a statute duly passed by the legislature. Because it is duty of the this Court to interpret and apply La. Civ. Code art. 2320 as written, including its third paragraph, the majority is acting in an unconstitutional manner. I respectfully dissent.